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# THE AMERICAN LAW REGISTER.

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## THE LAW OF ESCAPE IN CIVIL ACTIONS.

(Continued from the July No., ante, p. 422.)

### IV. ACTION FOR AN ESCAPE.

1. *In general*.—By the common law the sheriff and every jailer ought to keep persons in execution *in salva custodia*, and if such prisoner escape, an action upon the case lies against the custodian: 3 Com. Dig. 571. The consequence of a voluntary escape in civil cases is to make the sheriff responsible in an action of debt for the debt for which the prisoner was confined on final process: *Lash v. Ziglar*, 5 Iredell 702; the sheriff, however, being allowed to prove that the prisoner was insolvent at the time of his arrest, and then the plaintiff shall recover only for the damages he has sustained: *Shuler v. Garrison*, 5 W. & S. 455; *Patterson v. Westervelt*, 17 Wend. 543; *Smith v. Hart*, 1 Brevard 146. But if the plaintiff retakes the prisoner after an escape, whether voluntary or negligent, he cannot afterwards proceed against the sheriff: *Bassett v. Salter*, 2 Mod. 136; *Ethevick v. Brewell*, Comb. 396; and upon principle, it would seem that when the prisoner returns, after a voluntary escape, and the plaintiff has assented to consider him in custody at his suit, the sheriff would be equally discharged: 2 Bouv. Inst. 549. If, however, the plaintiff withholds his assent to consider a returned prisoner again in custody, the action will lie: 3 Co. 44, a; 1 Rol. Abr. 306, l. 13; 3 Com. Dig. 576. At the same time the removal of a prisoner having the

liberties of the jail from the limits thereof by virtue of a legal process, which affords justification to the officer taking him thence, is not an escape within 2 Rev. Stat. 437, § 63 (1864); *Wilikens v. Willet*, 4 Abb. (N. Y.) App. Dec. 596. In an action for an escape, whether voluntary or negligent, on mesne process, after the return of the writ, a voluntary return before suit brought is no defence: *Stone v. Woods*, 5 John. 181. After an arrest on mesne process, the officer having suffered a voluntary escape, may retake party: *Arnold v. Shives*, 10 Wend. 514. See also *Bronson v. Noyes*, 7 Wend. 188.

Also, if a party is in custody on final process, he cannot be retaken after a voluntary escape; otherwise after a negligent escape: *Butler v. Washburn*, 25 N. H. (5 Fost.) 251. The fact that the prisoner was recaptured in another state, by a sheriff of New York, after a negligent escape from his custody here, is not a ground for granting the prisoner's application for a discharge from custody: *Lockwood v. Mercereau*, 6 Abb. (N. Y.) Pr. 206. An officer is not bound to retake a prisoner if the escape is voluntary and under civil process: *Clark v. Cleveland*, 6 Hill (N. Y.) 344. And if a sheriff voluntarily permits a debtor in execution to escape, he cannot retake him; and if the creditor will not authorize a recapture this is not such a discharge of the debtor from imprisonment as will discharge the debt, and the sheriff will be liable for the same: *Jackson v. Hampton*, 6 Ired. (N. C.) L. 34. A sheriff cannot take notice of an attorney's privilege after he has once arrested him: *Secor v. Bell*, 18 Johns. 52. Where there has been an escape, and the prisoner dies before recapture, although there has been a fresh pursuit, the escape is not purged. In civil cases if a party escapes, who is in custody on mesne process, he may be retaken any time before the return day: *Commonwealth v. Sheriff*, 1 Grant (Pa.) 187. But if the party is held on final process, the sheriff becomes absolutely liable for the debt and costs by suffering the prisoner to go at large, and he cannot again imprison him: *Id.* Where the prisoner escaped through the insufficiency of the prison and not through any neglect of the sheriff, and the sheriff obtained an escape warrant and retook the prisoner before the issue joined: *Held*, that such retaking would not excuse the sheriff: *Parsons v. Lee*, Jeff. (Va.) 50. Insufficiency of the county jail, held no defence to action for escape: *Kepler v. Barker*, 13 Ohio St. 17 (1862).

The Virginia statute (1 Rev. Cod., ch. 136, § 1), which “for the more effectual retaking and securing persons who escape out of prison,” enacts that “if any person committed, rendered or charged in custody in execution, or upon mesne process, to any county or corporation prison, or to the jail of any district, shall thence escape” a justice of the peace may issue an escape warrant, does not authorize the issue of such warrant in the case of a person who escapes out of the custody of a sheriff before committed to prison: *M’Clintic v. Lockridge*, 11 Leigh (Va.) 253.

2. *Who may bring the action.*—An administratrix may maintain this action in her own name for the escape of a prisoner who is in execution on a judgment obtained by her as administratrix: *Bonafous v. Walker*, 2 T. R. 126. Indeed any party aggrieved by the default, misconduct or delinquency of the sheriff or by his deputy or subordinate, may bring this action: *Clute v. Goodell*, 2 McLean 193; *Lawrence v. Sherman*, Id. 488; and this in addition to any other fine, punishment or proceeding which may be authorized by law in New York: 3 Rev. Stats. 5th ed. 739, sect. 98. An action is also maintainable by the assigns of the plaintiff if for the wrong done to the property rights or interests of the assignor, the right of action would survive to the executor or administrator (3 Rev. Stats. 5th ed. 746, sect. 1): *Zabriskie v. Smith*, 3 Kern. 322; *McKee v. Judd*, 2 Id. 622; *The People v. Tioga Common Pleas*, 19 Wend. 73. See *Dininney v. Fay*, 38 Barb. Sup. Ct. 18. It seems to have been at one time doubted whether the executor could have an action against the sheriff for an escape upon mesne process, though there never was any doubt about the executor’s right of action for an escape on final process. But upon principle, as Mr. Chitty says (see 1 Chit. Pl. 79, 80), he may also have an action upon mesne process, the principle upon which the action is maintained being that the body is a pledge for the debt, and by the loss of the pledge the estate is injured. An executor has maintained an action for a false return to final process: *Williams’s Ex’r v. Cary*, 4 Mod. 403, on the ground that it was an injury to estate. *A fortiori* an escape is an injury. The North Carolina Act of 1777 gives an action of debt for an escape against the executors of the sheriff as well as to the executors of the creditor: *Wright v. Roberts*, 6 Ired. 147 (Rev. C. 105, sect. 20).

3. *Against whom action to be brought.*—The action for escape shall be brought against him who has the custody of the jail: Com.

Dig. 574. Though he has it *de facto* only and not *de jure*: 2 Inst. 381-2. And it shall be against the sheriff, not against his deputy: 2 Inst. 382; 1 Rol. Abr. 94, l. 30; *semb.* Hard. 34. A sheriff is liable for the acts of his deputy done under color of office whenever the deputy would be liable for the same acts: *Knowlton v. Bartlett*, 1 Pick. (Mass.) 271; *Marshall v. Hosmer*, 4 Mass. 60; *Bond v. Ward*, 7 Id. 123; *Waterhouse v. Waite*, 11 Id. 207; *Tobey v. Leonard*, 15 Id. 200; *Smith v. Joiner*, 1 D. Chip. (Vt.) 62. In Virginia the high sheriff alone is liable for the official acts of his deputy, unless in a case where a special remedy is provided against the latter: *White v. Johnson*, 1 Wash. (Va.) 159. A sheriff in Virginia is *ex officio* jailer and is liable for the misconduct of his turnkey or servant: *Dabney v. Talliaferro*, 4 Rand. (Va.) 256. A marshal is liable in a civil action for the acts of his deputy done by virtue of his office. Such action may be brought against both: *Cotton v. Marsh*, 3 Wis. 221.

In California, a sheriff is responsible for the acts of his deputy, but not so far as to require of the sheriff impossibilities or to impose unconscionable exactions: *Whitney v. Butterfield*, 13 Cal. 335. In Kentucky, a sheriff is responsible for all the official acts of his deputies, and for any nonfeasance or unintentional misfeasance (as for taking insufficient security) he alone is liable, nor can an action be maintained against his deputy: *Murrell v. Smith*, 2 Dana (Ky.) 462; *Owens v. Gatewood*, 4 Bibb (Ky.) 494. The sheriff and deputy cannot be sued jointly for a tort done by the deputy alone: *Campbell v. Philips*, 1 Pick. (Mass.) 62. In law, the sheriff and his deputy are considered as one officer: *Watson v. Todd*, 5 Mass. 271; *Perley v. Foster*, 9 Id. 112; *Vinton v. Bradford*, 13 Id. 114; *Congdon v. Cooper*, 15 Id. 10; *Jentry v. Hunt*, 2 McCord (S. C.) 410; *Hazard v. Israel*, 1 Binn. (Pa.) 240; *Moore v. Dawney*, 3 Hen. & Munf. (Va.) 127; *Estes v. Williams*, Cooke (Tenn.) 413; *Prewitt v. Neal*, Minor (Ala.) 386. The sheriff is therefore responsible for all official neglect or misconduct of his deputy, and also for his acts not required by law where he assumes to act under cover of office; but he is not responsible for the neglect of any act or duty which the law does not require the deputy officially to perform: *Clute v. Goodell*, 2 McLean 193; *Harrington v. Fuller*, 18 Me. 277; *Lawson v. Sherman*, 2 McLean 488; *State v. Moore*, 19 Mo. 369. But any one charged with the execution of a writ by the power whence it

emanated, is liable for a neglect of duty under it. Therefore the bailiff of a liberty having the return and execution of writs, is answerable for the escape of a prisoner arrested by him under a writ with the sheriff's mandate thereon: 2 T. R. 5; Com. Dig. 575. At common law, a stranger cannot sue a deputy sheriff for the breach or non-performance of his official duties. The principal sheriff is liable to persons thus injured, and the deputy is liable to his principal. The same rule applies in the case of the Commonwealth, in the absence of any statute rendering the deputy liable to it; and the sheriff and his sureties are liable for such breach: *Harlan v. Lumsden*, 1 Duv. (Ky.) 86. Compare *Calvin v. Holbrook*, 2 N. Y. (2 Comst.) 126. A joint action will not lie against a sheriff and his deputy for the acts of the deputy: *Moulton v. Norton*, 5 Barb. (N. Y.) 303.

4. *Damages*.—The liability in equity of a sheriff for an escape, is the loss actually sustained, and the court will ascertain the amount of damages: *Moore v. Moore*, 25 Beav. 8; 4 Jur. N. S. 250; 27 L. J. Chanc. 385. Actual injury is the proper measure subject to evidence in mitigation, as, *e. g.*, insolvency: *Hootman v. Shriner*, 15 Ohio St. 43 (1864). The measure of damages is the value of the custody of the debtor at the time of the escape; but in estimating such value the jury is not limited to the consideration of the actual available means of the debtor, but they may consider, according to the evidence of the case, the value of the chances of the creditor's obtaining payment by continuing such imprisonment: *Macrae v. Clarke*, 1 H. & R. 479; Law Rep. 1 C. P. 403; 35 L. J. C. P. 247; 12 Jur. N. S. 708; 14 W. R. 655; 14 Law Times N. S. 408.

In Pennsylvania, the statutes 13 Edw. 1, c. 11 (Westm. 2), and 1 Rich. 2, c. 12, are in force: *Shewell v. Fell*, 3 Yeates 17, s. c. 4 Yeates 47, and in an action of *debt* against the sheriff the jury, if they find for the plaintiff, must find the whole debt and costs: *Id.*; *Duncan v. Klinefelter*, 5 Watts 141. But if the action be *in case*, it is otherwise: *Shuler v. Garrison*, 5 W. & S. 455. In *case*, the measure of damages is the actual loss sustained, and it is competent in *case* to prove the insolvency of the defendant, but in *debt* it is not: *Snyder v. Commonwealth*, 1 Penna. 94; *Kirsh v. Commonwealth*, 3 Barr 269. See also *Wolverton v. Commonwealth*, 7 S. & R. 273.

But actual injury is not the proper measure of damages where

the escape has been voluntary and the officer has been actuated by fraud, malice or corruption: *Hootman v. Shriner*, 15 Ohio St. 43 (1864). In an action for an escape where the complaint is in the nature of a declaration in an action of debt, 2 R. S. 437, § 63, the defendant cannot show the insolvency of the debtor in mitigation: 4 Bosw. 384, 391; New York Sup. Ct., *McCreery v. Willett*, 23 Howard Pr., affirming 4 Bosw. 643 to same effect (1859); *Renich v. Osler*, Id. 384; *Barnes v. Willett*, 35 Barb. 514, s. c. 12 Abb. Pr. 448, affirming 11 Id. 225; 19 How. Pr. 564; N. Y. Common Pleas 1862, *Daguerre v. Orser*, 15 Abb. Pr. 113, affirmed 10 Id. 12, *note*. This is so where the action is founded on statutory liability imposed by code upon the sheriff neglecting to justify after notice of exception: 9 How. Pr. 188; Abb. Pr. 256; 1 Bos. & P. 450; 14 East 599; *Metcalf v. Stryker*, 31 N. Y. 255, affirmed 31 Barb. 62; same more fully reported in 10 Abb. Pr. 12; *Bensel v. Lynch*, 14 N. Y. 162, affirmed 2 Rob. 448; compare *Smith v. Knapp*, 30 N. Y. 580; 2 Abb. N. Y. Dig. 783-788. In Louisiana, a sheriff is only liable for actual damages sustained: *Bojel v. Bell*, 15 La. Ann. 163. By 3 R. S., 5th ed., 853, § 21, if an actual loss or injury shall have been produced to any party, by the misconduct alleged, a fine shall be imposed sufficient to indemnify such party, and to satisfy his costs and expenses, which shall be paid over to him on the order of the court. And in such case the payment and acceptance of such fine shall be an absolute bar to any action, by such aggrieved party, to recover damages for such injury or loss.

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(To be continued.)

## RECENT AMERICAN DECISIONS.

### *Supreme Court of Kansas.*

#### HARRISON BERRY v. MONTGOMERY CARTER.

Where several persons enter into a written contract, stipulating that each shall keep up his own cattle, and prevent the same from trespassing upon or injuring the crops or hedges of any of the others, for the period of three years, and that in case any injury should occur by reason of the cattle of any one of said persons trespassing upon the crops or hedges of any of the others, and in case the parties themselves could not agree upon the amount of the damages sustained, then that the question as to the amount of such damages should be submitted to arbitrators,